LAI YOKE NGAN & ANOR.

v.

CHIN TECK KWEE & ANOR.

FEDERAL COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)
MOHD AZMI FCJ
GOPAL SRI RAM JCA
[CIVIL APPEAL NO: 02-669 & 670 OF 1993]
5 MAY 1997

CIVIL PROCEDURE: *Judgment - Default judgment - Striking out application by writ for injunctions - No appearance entered by defendants - Plaintiff's Counsel informed that defendants would not defend action - Application for interim injunction to be made absolute - Order in terms - Assessment of damages also directed although no judgment made to assess damages - Defendants subsequently purported to enter appearance and applied to set aside order directing assessment of damages and for writ to be struck out on ground that indorsement did not disclose any cause of action - Order made to set aside default judgment and for writ to be struck out - Appeal - Default judgment irregular and rightly set aside - Learned Judge wrong in striking out of the plaintiffs' writ - Appeal allowed and writ restored - Rules of the High Court 1980, O. 13 r. 6(1) and O. 18 rr. 1 and 19*

In this case the plaintiffs, the executors of the will of Chin Sam Cheong, deceased had issued a writ against the defendants, the beneficiaries of the deceased's estate, claiming several declarations and injunctions. In substance the declaratory relief was armed at establishing the plaintiff's rights to conduct the business of a sawmill, which was one of the assets of the deceased's estate, without interference. The injunctive relief was directed at restraining the defendants from interfering with the business of the sawmill and to prevent the first defendant from holding out that he was the licensee of the sawmill. There was also a claim for damages.

On the date the writ was issued the plaintiffs applied by summons *ex parte* for several interim injunctions the effect of which was to restrain the defendants from interfering with the business of the sawmil. The learned Judicial Commissioner granted the interim relief sought but directed that the application be heard *inter partes* on the subsequent date fixed. When the matter came on for hearing, after an initial adjournment, the plaintiffs informed the learned Judicial Commissioner that Counsel for the plaintiffs had been informed by the first defendant's solicitor that he had advised the first defendant not to defend and that neither he nor his client would be appearing

at the hearing of the summons. Plaintiffs' Counsel then applied for an order that the interim injunction be made absolute against both defendants. He also applied for an order requiring the Registrar to assess damages. No appearance for the writ having been entered, Counsel undertook to file a certificate of non-appearance. The learned Judicial Commissioner thereupon made an order in terms of the plaintiff's summons and directed an assessment of damages.

Subsequently some two months after the last proceedings before the learned Judicial Commissioner, the defendants purported to enter appearance and subsequently they took out a summons to set aside only so much of the order as directed an assessment of charges. Subsequently they applied for the writ to be struck out on the ground that the indorsement upon it did not disclose any cause of action. The learned Judge at first dismissed the application in chambers but after hearing arguments he granted an application for further argument in Court. The learned Judge after hearing the further arguments reversed the order he had made in chambers and set aside the whole of the judgment in default. He also struck out the writ.

The defendants appealed against the decision of the learned Judge.

Held:
Per Mohd Azmi FCJ

[1] The principle of setting aside a default judgment has been well established. A default judgment is not a judgment on the merits. When such a judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But when the default judgment has been obtained regularly, in order to succeed the defendant must file an affidavit of merits, which must disclose that he has a defence on the merits and that he has an arguable or triable issue on the merits.

[2] Applying the above principle to the facts of these appeals, it is clear that the default judgment (the subject-matter of the first appeal) is irregular for non-compliance with the Rules of the High Court, in particular O. 13 r. 6(1), by failing to serve a statement of claim on the defendants. The learned Judge was therefore correct in setting aside the entire default judgment. There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the default judgment was entered, just as the order to assess damages in the absence of judgment granting damages, had prejudiced the defendants and were therefore beyond curability.

[3] The appeal against the unjustified striking out of the plaintiff's writ is allowed. The striking out order was completely against all the principles governing O. 18 r. 19 of the Rules of the High Court. The writ as well as the order of injunction against the defendants should accordingly be reinstated.

Per Gopal Sri Ram JCA

[1] The default judgment in this case was merely irregular and not a nullity. Orders and judgments made or entered by a Court, in private law litigation, in the exercise of the coercive power upon the default of a party to a suit, even when made or entered in breach of a rule of Court or of practice are merely irregular and not nullifies.

[2] The proper approach is for a Court to accept that a breach of a rule of Court renders the particular proceeding irregular with a power in the Court to excuse the non-compliance. Ultimately it is the objective perception of a Court as to where justice in a particular case lies that determines whether the irregularity should be cured. If the Court decides the particular case to be right for the exercise of the power, then it must set aside the judgment, order or other proceeding.

[3] The philosophy underlying O. 13 r. 6(1) of the Rules of the High Court is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon the question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the Court, upon a motion for judgment, that the case is a fit one for specific relief.

[4] A defendant who has failed to enter an appearance to an action for specific relief is not precluded from appearing in person or by Counsel at the hearing of the motion for judgment for the purpose of contending that the particular case is one in which the discretion should be exercised against the plaintiff and that specific relief ought to be denied him. To deprive a defendant of the right of appearing upon a motion for judgment and arguing that discretion ought not to be exercised in a plaintiff's favour is a serious matter. It constitutes the breach of a substantive right forming part and parcel of the doctrine of procedural fairness.

[5] The judgment for assessment of damages was found in a judgment which was flawed in other respects. The learned Judge in this case was perfectly entitled in the interests of justice, to take cognisance of the breach of O. 13 r. 6(1) and to set aside the whole of the offending judgment. The

authority of the Court to act *suo motu* to set aside a judgment entered pursuant to its coercive power must be exercised with caution but it can be exercised in appropriate cases, and this case was indeed a proper case.

[6] It was argued in this case that it was not open to the defendants, they having encouraged the plaintiffs to believe that the action will not be contested, to challenge any judgment entered in the proceedings. However, the plaintiffs were guilty of unconscionsable conduct in obtaining an order directing the Senior Assistant Registrar to assess damages, although there was no judgment to assess the damages. This had the effect of releasing the defendants from any estoppel that may have arisen. It was therefore open to the defendants to pursue any and all of the courses made available to them by adjectival law to rid themselves of the offending judgment.

[7] Under O. 18 r. 1 of the Rules of the High Court, a plaintiff may serve his statement of claim with his writ or if not, not later than fourteen days after a defendant has entered appearance. In this case, neither defendant entered appearance until judgment had been signed. The rule upon which the defendants' primary argument was based for striking out the plaintiffs' writ had therefore no application to the facts in this case.

[8] The learned Judge was wrong also in striking out the plaintiff writ on the ground that it failed to disclose a cause of action. In the present case the declarations contained a statement of facts that adequately identified a cause of action. The summary power under O. 18 r. 19 to strike out the indorsement might not to be invoked save in a plain and obvious case. In this case, however, those were several issues of facts that could only be resolved after taking *viva voce* evidence and there were several issues of law that required mature consideration. In the circumstances, the learned Judge was quite wrong in striking out the writ in this case.

[9] The second appeal was allowed, the Judge's order in striking the writ set aside and the writ restored to the file. It was also ordered that the injunctions which had fallen in consequence be reinstated. The plaintiffs were also granted leave to serve their statement of claim within two weeks from the date of the order.

[First appeal dismissed; second appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Permohonan melalui writ untuk injunksi - Defendan tidak memasukkan kehadiran - Peguam plaintif diberitahu yang defendan tidak akan membuat pembelaan - Permohonan untuk injunksi interim dijadikan mutlak - Perintah seperti dipohon - Taksiran gantirugi diarahkan walaupun tiada penghakiman dibuat untuk mentaksir gantirugi - Defendan kemudiannya*

memasukkan kehadiran dan memohon untuk mengenepikan perintah mengarahkan taksiran gantirugi dan untuk writ dibatal atas alasan indorsmen tidak menunjukkan sebarang kausa tindakan - Perintah dibuat untuk mengenepikan penghakiman ingkar dan untuk writ dibatalkan - Rayuan - Penghakiman ingkar di luar aturan dan diketepikan secara wajar - Hakim yang arif salah dalam membatalkan writ plaintif - Rayuan dibenarkan dan writ dipulihkan - Kaedah-kaedah Mahkamah Tinggi 1980, A. 13 k. 6(1) & A. 18 kk. 1 & 19.

Dalam kes ini plaintif, wasi kepada wasiat Chin Sam Cheong, si-mati, telah keluarkan writ terhadap defendan, benefisiari harta pusaka si-mati dan menuntut beberapa deklarasi dan injunksi. Relief perisytiharan tersebut pada hakikatnya ditujukan kepada pembuktian hak plaintif untuk menjalankan perniagaan kilang papan yang merupakan satu aset harta pusaka si-mati, tanpa gangguan. Relief injunksi adalah diarahkan terhadap menahan defendan dari mengganggu perniagaan kilang papan dan untuk menahan defendan pertama dari mengemukakan diri sebagai pemegang lesen kilang papan. Juga terdapat tuntutan untuk gantirugi.

Pada tarikh writ dikeluarkan, plaintif telah memohon melalui saman *ex parte* untuk beberapa injunksi interim yang kesannya adalah untuk menahan defendan dari mengganggu perniagaan kilang papan tersebut. Pesuruhjaya Kehakiman yang arif telah memberi relief interim yang diingini tetapi telah mengarahkan supaya permohonan dibicarakan *inter partes* pada suatu tarikh selepasnya yang ditetapkan. Bila perkara tersebut dibicarakan, selepas penangguhan awal, plaintif memberitahu yang arif Pesuruhjaya Kehakiman bahawa Peguam bagi plaintif telah dimaklumkan oleh Peguam defendan pertama bahawa beliau telah menasihatkan defendan pertama supaya jangan membela tindakan dan bahawa beliau serta anak guamnya tidak akan hadir pada pembicaraan saman tersebut. Peguam plaintif seterusnya telah memohon untuk perintah supaya injunksi interim dijadikan mutlak terhadap kedua-dua defendan. Beliau juga memohon untuk perintah memerlukan pendaftar mentaksirkan gantirugi. Oleh kerana tiada kehadiran terhadap writ difailkan maka Peguam telah mengakujanji akan memfailkan sijil ketidakhadiran. Yang arif Pesuruhjaya Kehakiman telah membuat perintah seperti dipohon dalam saman plaintif dan mengarahkan supaya gantirugi ditaksirkan.

Kemudiannya, lebih-kurang dua bulan selepas prosiding terakhir di hadapan yang arif Pesuruhjaya Kehakiman, defendan memasukkan kehadiran dan kemudiannya mengeluarkan saman untuk mengenepikan bahagian perintah yang mengarahkan pentaksiran gantirugi. Kemudiannya mereka memohon pula untuk membatalkan writ atas dasar indorsmen padanya tidak menunjukkan sebarang kausa tindakan. Yang arif Hakim pada mulanya menolak permohonan tersebut dalam kamar tetapi setelah mendengar hujah, beliau telah membenarkan

penghujahan lanjut di Mahkamah. Setelah mendengar penghujahan lanjut tersebut yang arif Hakim telah membalikkan perintah yang dibuatnya dalam kamar dan telah mengenepikan kesemua penghakiman ingkar. Beliau juga telah membatalkan writ. Defendan merayu terhadap keputusan yang arif Hakim

Diputuskan:

Oleh Mohd Azmi HMP

[1] Prinsip mengenepikan penghakiman ingkar sudah lama termaktub. Penghakiman ingkar bukanlah penghakiman berdasarkan merit. Bila penghakiman begini diperolehi secara luar aturan, pemerolehan secara luar aturan tersebut menjadi alasan yang cukup untuk mengenepikannya. Tetapi bila penghakiman ingkar diperolehi mengikut aturan, maka, untuk berjaya, defendan mestilah memfailkan affidavit merit yang menunjukkan bahawa ia mempunyai pembelaan atas merit dan bahawa beliau mempunyai isu yang boleh dihujahkan atau dibicarakan atas merit.

[2] Dengan memakai prinsip diatas kepada fakta rayuan-rayuan disini, adalah jelas bahawa penghakiman ingkar (perkara rayuan pertama) adalah di luar aturan kerana tidak mematuhi Kaedah-kaedah Mahkamah Tinggi, secara spesifiknya A. 13 k. 6(1) dengan tidak menyampaikan pernyataan tuntutan kepada defendan. Hakim yang arif dengan itu bertindak dengan betul apabila mengenepikan keseluruhan penghakiman ingkar. Tiada pertikaian bahawa luar aturan prosedur tersebut, dalam gagal menyampaikan pernyataan tuntutan kepada defendan sebelum memasuki penghakiman ingkar, seperti juga perintah untuk mentaksirkan penghakiman ingkar bila tiada penghakiman memberi gantirugi, telah memprasangkakan defendan dan dengan itu tidak boleh dipulihkan lagi.

[3] Rayuan mengenai pembatalan writ plaintif yang tidak berasas adalah dibenarkan. Perintah pembatalan tersebut adalah bertentangan dengan semua prinsip A. 18 k. 19 Kaedah Mahkamah Tinggi. Writ serta perintah injunksi terhadap defendan patut di pulihkan.

Oleh Gopal Sri Ram HMR

[1] Penghakiman ingkar dalam kes ini hanya di luar aturan sahaja dan bukannya pembatalan. Perintah dan penghakiman yang dibuat atau dimasukkan oleh Mahkamah, dalam litigasi sivil persendirian, dalam menggunakan kuasa paksaan Mahkamah atas keingkaran sesuatu pihak kepada guaman, walaupun dibuat atau dimasukkan secara melanggar kaedah Mahkamah atau amalan, adalah hanya di luar aturan dan bukan pembatalan.

[2] Pendekatan yang betul adalah untuk Mahkamah menerima bahawa pelanggaran kaedah Mahkamah tersebut menjadikan prosiding tersebut di luar aturan tetapi Mahkamah berkuasa untuk memaafkan ketidakpatuhan tersebut. Pada akhirnya, faktor penentu samada sesuatu keluar-aturan itu patut dimaafkan adalah bergantung kepada persepsi Mahkamah, yang dibuat secara objektif, tentang dimana keadilan itu terletak. Jika Mahkamah memutuskan sesuatu kes itu sesuai untuk melaksanakan kuasanya, maka ianya mestilah mengenepikan peghakiman, perintah atau prosiding yang lain.

[3] Falsafah yang mendasari A. 13 k. 6(1) Kaedah-kaedah Mahkamah Tinggi adalah bahawa relif spesifik adalah, pada sifatnya, merupakan perkara budibicara. Seorang defendan mungkin mengambil keputusan untuk tidak membuat pembelaan dalam tindakan di mana relief tersebut dituntut dengan kepercayaan tulus bahawa dia tidak mempunyai pembelaan atas soalan liabiliti. Akan tetapi ini tidak bermakna yang pihak plaintif tidak perlu menghantar-serah pernyataan tuntutan dan memuaskan Mahkamah, dalam usul untuk penghakiman, bahawa kes tersebut adalah sesuai untuk relif spesifik.

[4] Seseorang defendan yang gagal memasukkan kehadiran didalam tindakan untuk relif spesifik tidak dihalang daripada hadir di Mahkamah secara sendiri atau melalui Peguam untuk menghujah bahawa kes tersebut adalah kes di mana budibicara patut di gunakan secara yang menentang plaintif dan relif spesifik tidak sepatutunya diberi kepadanya. Menafikan hak seseorang defendan untuk hadir bila terdapat usul untuk penghakiman dan menghujah bahawa budibicara tidak sepatutnya digunakan untuk pihak plaintif adalah perkara serius. Ia merupakan perlanggaran hak substantif yang menjadi sebahagian daripada doktrin keadilan prosedur.

[5] Penghakiman untuk taksiran gantirugi di sini terkandung dalam penghakiman yang mengandungi kesilapan. Hakim yang arif dalam kes tersebut berhak dalam menjaga kepentingan keadilan, untuk mengambil tahu tentang perlanggaran A. 13 k. 6(1) dan untuk mengenepikan kesemua penghakiman yang salah itu. Kuasa Mahkamah untuk bertindak *suo muto* untuk mengenepikan penghakiman yang dimasukkan mengikut kuasa paksanya mestilah digunakan dengan berhati-hati, tetapi ia boleh digunakan dalam kes yang sesuai, dan kes ini sememangnya kes yang sesuai.

[6] Adalah dihujahkan dalam kes ini bahawa defendan tidak boleh, selepas menggalakkan plaintif untuk percaya bahawa tindakan berkenaan tidak akan ditentang, untuk mencabar sebarang penghakiman yang dimasukkan dalam prosiding. Akan tetapi plaintif telah berkelakuan tidak patut dalam mendapatkan perintah mengarahkan Penolong Kanan Pendaftar untuk

mentaksirkan gantirugi, walaupun tiada penghakiman untuk mentaksirkan gantirugi. Ini membawa kesan melepaskan defendan dari sebarang estoppel yang mungkin telah timbul. Dengan itu adalah terbuka kepada defendan untuk mengambil mana-mana jalan yang terbuka kepadanya dari segi undang-undang tatacara untuk mengatasi penghakiman yang salah itu.

[7] Dibawah A. 18 k. 1 Kaedah-kaedah Mahkamah Tinggi, seorang plaintif boleh menyampaikan pernyataan tuntutannya bersama writ atau tidak lebih dari empat belas hari selepas defendan telah memasukkan kehadiran. Dalam kes ini tiada defendan yang memasuki kehadiran hingga selepas penghakiman ditandatangani. Peraturan berasaskan mana hujah asas defendan didasarkan dengan itu tidak terpakai ke atas fakta kes ini.

[8] Hakim yang arif juga adalah salah dalam membatalkan writ plaintif atas dasar bahawa ia tidak menunjukkan kausa tindakan. Dalam kes ini deklarasi-deklarasi tersebut mengandungi pernyataan fakta yang dengan secukupnya menunjukkan kausa tindakan. Kuasa terus di bawah A. 18 k. 19 untuk membatalkan indorsmen tidak harus di gunakan kecuali dalam kes yang jelas dan terang. Namun begitu dalam kes ini itu merupakan isu fakta yang hanya boleh di atasi selepas mengambil keterangan secara lisan dan ada pula beberapa isu-isu undang-undang yang memerlukan pertimbangan yang sewajarnya. Dalam keadaan tersebut, Hakim yang arif adalah salah dalam membatalkan writ dalam kes ini.

[9] Rayuan kedua adalah dibenarkan, perintah Hakim untuk membatalkan writ adalah diketepikan dan writ dikembalikan ke fail. Adalah juga diperintahkan bahawa injunksi dipulihkan. Plaintif juga diberi kebenaran untuk menyampaikan pernyataan tuntutan dalam masa dua minggu dari tarikh perintah.

[Perintah sekadarnya.]

Cases referred to:

Evans v. Bartlam [1937] AC 478 ***(refd)***

Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 MLJ 40 ***(refd)***

Metroinvest Ansalt v. Commercial Union Assurance Co. Ltd. [1985] 2 All ER 318 ***(foll)***

Lam Kong Co. Ltd. v. Thong Guan & Co. (Pte) Ltd. [1985] 2 MLJ 429 ***(foll)***

Stewart Chartering Ltd. v. C & O Managements S.A. [1980] 1 All ER 718

Jet West Ltd. & Anor. v. Haddican & Ors. [1992] 1 WLR 487 ***(dist)***

Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd. [1985] 1 MLJ 7 ***(refd)***

Langdale & Anor. v. Danby [1982] 1 WLR 1123 ***(refd)***

Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. [1995] 4 CLJ 283 ***(refd)***

Lim Hean Pin v. Thean Seng Co. Bhd. [1992] 2 MLJ 10 ***(refd)***
Bandar Builder Sdn. Bhd. v. United Malayan Banking Corp. Bhd. [1993] 4 CLJ 7 ***(foll)***

Legislation referred to:
Administration of Justice Act 1960, s. 13(3)
Courts of Judicature Act 1964, ss. 69(4), 101
Rules of the High Court 1980, O. 2 r. 1(1), O. 12 rr. 4(a), 5(1)(a), O. 13 rr. 6(1), (8), O. 18 rr. (1), (19)
Rules of the Supreme Court 1957, O. 13 r. 12, O. 59 r. 10(3)

[Appeal from High Court Malaya, Seremban; Civil No: 22-153 of 1991]

For the appellants - C.V. Das (Pretam Singh with him); M/s. Stanley Ponniah, Ng & Soo
For the respondents - Lim Kem Thuan; M/s. Lim Kem Thuan & Co.

JUDGMENT

Mohd Azmi FCJ:

On 22 April 1996, this Court had unanimously dismissed the plaintiffs' first appeal against an order of the High Court at Seremban dated 23 October 1993, which had set aside a judgment in default of appearance obtained by them against the defendants on 2 December 1991 (FCCA 02-669-1993) but had allowed their second appeal (FCCA 02-670-1993) against another order made in the same proceedings for the striking out of their entire writ under O. 18 r. 19 RHC in addition to the setting aside of the default judgment.

The subject matter in these appeals concerned a family dispute over the ownership and management of a sawmill in Tampin, which the plaintiffs' as administrators of the estate of Chin Sam Seong @ Chan Sam Seong, claimed to be part of the deceased estate, and therefore unlawfully managed by the defendants. The plaintiffs had filed on 9 November 1991 a writ of summons against the defendants without a statement of claim, but with the prayers for declaratory reliefs, injunction and damages endorsed. Apart from the default judgment, there was also an order made to assess damages although there was no existing order granting damages to the plaintiffs.

The principle of setting aside a default judgment under O. 13 r. 8 has been well established and needs no detailed repetition. What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But where the default judgment has been obtained regularly, in order to succeed the defendant must file an affidavit of merits, i.e. the defendant must disclose by affidavit evidence that *prima facie*

he has a defence on the merits. Put in another way, the affidavit must disclose that he has an arguable or triable issue on the merits. (see *Evans v. Bartlam* [1937] AC 478). The following judgment of Lee Hun Hoe CJ in *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 MLJ 40 at p. 41 is also instructive:

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the Court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the Court should act in *Evans v. Bartlam* [1937] AC 473 in these words:
>
> > ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.
>
> In the instant case the learned Judge did not consider the judgment to be irregular. *Mallal's Supreme Court Practice*, 2nd Ed. Vol. 1 at p. 84 explains the position where the judgment is regular thus:
>
> > The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'yat* [1979] 1 MLJ 23; *Farden v. Richter* [1889] 23 QBD 124.
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> A defence on the merits means merely raising only an arguable or triable issue, eg. contributory negligence in a running down case in *White v. Weston* [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L. Oppenheim & Co. v. Mahomed Haneef* [1922] 1 AC 482.

Although under O. 2 r. 1(1) Rules of the High Court 1980, non-compliance with the rules of procedure is to be regarded as mere irregularity and not a nullity, the Court, like any other discretionary powers, must exercise its discretion to cure such procedural irregularity on correct principle. The proper approach that should be adopted on curability should be on the basis of the principle laid down recently by Lord Woolf MR in *Nicholls v. Nicholls* (The Times 21 January 1997) on the exercise of the discretion conferred by the English RSC O. 59 r. 10(3) and s. 13(3) of the Administration of Justice Act 1960:

> I have cited extensively from the previous authorities to indicate that they show no common pattern of approach. The later cases do however make it clear that it is now recognised that O. 59 r. 10(3) and s. 13(3) of the 1968 Act do give a Court the power to rectify procedural defects both in the procedure leading

up to the making of the committal order and after a committal order has been made. Like any other discretion the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the Court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor.

The Court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the Court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the Judge was a valid order, the approach of this Court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.

In the future therefore it should not be necessary to revisit the authorities prior to the decision in *M. v. P. Butler and Butler*. It should be recognised that O. 59 r. 10 and s. 13(3) of the 1960 Act give the Court a discretion which they are required to exercise. To decline to exercise that discretion because of a technical error in the notice of application to commit or the committal order itself, in the absence of any prejudice, is to derogate from that discretion.

On the basis of the above principle, the discretion available to this Court to cure irregularities under O. 2 r. 1(1) Rules of the High Court 1980 read together with s. 69(4), Courts of Judicature Act 1964 [the equivalent of English O. 59 r. 10(3)] and as well as s. 101 which allows this Court to discount "any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the Court", should only be undertaken by the Court in the absence of prejudice. Thus defects affecting merits or the jurisdiction of the Court ought not to be cured, in the exercise of the discretionary power.

Applying the above principle to the facts of these appeals, it is clear that the default judgment (the subject-matter of the first appeal) is irregular for non-compliance with the Rules of the High Court in particular O. 13 r. 6(1) by failing to serve a statement of claim on the defendants. On this ground alone, the learned Judge was correct in setting aside the entire default judgment. There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the default judgment was

entered, just as the order to assess damages in the absence of judgment granting damages, had prejudiced the defendants and therefore beyond curability.

In my view, in dismissing the first appeal there is no real necessity in castigating Counsel for the appellants for entering appearance without leave about two months after the default judgment was entered. The question of leave under O. 12 r. 5(a) was not an issue and never argued in the High Court. It was raised for the first time in this Court, and Counsel for the appellants had unwittingly in answer to questions by the Court said the judgment of 2 December 1971 was a nullity which could not be so in view of the provisions in O. 2 r. 1 of the High Court Rules. But a judgment or order may of course be a nullity in a very limited number of cases, for instance where there is lack of jurisdiction as envisaged by s. 101 Courts of Judicature Act 1964, not because of any defects in the rules of procedure, but because the Court itself has acted in excess or without jurisdiction. Further, the disappearance of the distinction between nullity and irregularity of judgment or order relates only to O. 2 r. 1(1) of the High Court Rules 1980, and not for non-compliance with the provisions of any other law including the Constitution. In any event, the very fact that the application to set aside was made by the appellants indicated that they could not seriously claim that they were never at any time bound by the default judgment.

On the second appeal I have had the advantage of reading the judgment in draft of my learned brother Dato' Gopal Sri Ram JCA, and I agree entirely with his reasons for allowing the appeal against the unjustified striking out of the appellants' writ, purely because of the setting aside of the default judgment. I fully agree that the striking out order was completely against all principles governing O. 18 r. 19 RHC. The writ as well as the order of injunction against the respondents should accordingly be reinstated.

Gopal Sri Ram JCA:

These two appeals arise from two orders made in the same suit filed in the Seremban High Court. The appellants in both appeals were the plaintiffs in the original action, while the respondents were the defendants. For convenience, I will refer to the parties according to the title assigned to them respectively in the Court below. Appeal No: 669/93 (which we will throughout this judgment refer to as 'the first appeal') is in respect of the order of the learned Judge setting aside the judgment in default obtained by the plaintiffs. Appeal No: 670/93 ('the second appeal') is directed against the order of the learned Judge striking out the plaintiffs writ in the suit.

These appeals on 22 April 1996. At the conclusion of the arguments, the first appeal was dismissed, but the second was allowed.

The background to these appeals is as follows.

The plaintiffs are the executors of the will of Chin Sam Seong @ Chan Sam Seong, deceased ('the deceased'). The first plaintiff is the widow of the deceased; the second plaintiff is the eldest son.

The defendants are the beneficiaries of the deceased's estate. They are also the children of the deceased and the first plaintiff.

One of the assets of the deceased's estate is a sawmill. It is called "Tampin Sawmill". The plaintiffs have the conduct of the business of the sawmill.

In consequence of an incident that is alleged to have occurred at the sawmill on 4 November 1991, the plaintiffs, on 9 November 1991, caused to be issued a writ against the defendants on which there was indorsed a claim for several declarations and injunctions. In substance, the declaratory relief was aimed at establishing the plaintiffs' right to conduct the business of the sawmill without interference. The injunctive relief was directed at restraining the defendants from interfering with the business of the sawmill and to prevent the first defendant from holding out that he was the licensee of Tampin Sawmill. There was also a claim for damages.

On the date the writ was issued, the plaintiffs moved *ex parte* for several interim injunctions the effect of which was to restrain the defendants from interfering with the business of the sawmill. The learned Judicial Commissioner who entertained the plaintiffs' *ex parte* summons granted the interim relief sought, but only until 16 November 1991, with a direction that the application be heard *inter partes* on that date.

When the matter came on for hearing on the return date, the first defendant appeared and applied for an adjournment to enable him to appoint Counsel. The learned Judicial Commissioner granted this request, adjourned the *inter partes* hearing of the summons to 28 November 1991 and extended the injunction to that date.

On 28 November 1991, when the summons was called on for hearing, Counsel for the plaintiffs informed the learned Judicial Commissioner of a telephone conversation that he had with the first defendant's solicitor on the afternoon of the preceding day. During that conversation, Counsel for the plaintiffs had been told by the solicitor in question that he (the solicitor) had advised the first defendant not to defend and that neither he nor his client would be

appearing at the hearing of the summons. Plaintiffs' Counsel then moved the Court for an order that the interim injunction be made absolute against both defendants. He also applied for an order requiring the registrar to assess damages. No appearance to the writ having been entered to the writ, Counsel undertook to file a certificate of non-appearance.

After being so informed by Counsel, the learned Judicial Commissioner made an order in terms of the plaintiffs' summons and directed an assessment of damages. The order extracted from the registry of the High Court contains the injunctions and also a minute directing the assessment of damages. How the latter order could have been made in the absence of a judgment awarding the plaintiff damages is a matter of pure amazement.

On 2 December 1991, the plaintiffs' solicitors filed a certificate of non-appearance, and on the same day, entered a form of judgment in default in which all the relief claimed in the indorsement to the writ was granted.

On 28 January 1992, that is to say, some two months after the last proceedings before the Judicial Commissioner, the defendants purported to enter appearance. I use the expression "purported" advisedly, because judgment had already been entered against the defendants by that date.

Now, although a defendant to an action has, under the terms of O. 12 r. 4(a), eight days in which to enter appearance, he may, because of the operation of O. 12 r. 5(1), enter an appearance at any time before judgment is entered against him. He may enter an appearance **after** judgment only upon obtaining leave of the Court.

In the present case, judgment having been entered against them on 2 December 1991, the defendants required leave of Court before they were entitled to appear in form. Needless to say, no such application was ever made. But the point does not seem to have attracted anyone's attention. When it was raised with Counsel for the defendants before this Court, his response was that the default judgment of 2 December 1991 was a nullity, and, for that reason, there was no judgment against his clients, so that the appearance entered on 28 January 1992 was good.

I will, in due course, deal with the regularity of the judgment entered against the defendants. But, for the moment, I would deal with the fallacy in the view expressed by Counsel. It must be borne in mind that the default judgment in question is merely irregular and not a nullity. Orders and judgments made or entered by such a Court, in private law litigation, in the exercise of its coercive power upon the default of a party to a suit, even when made or entered in breach of a rule of Court or of practice, are merely irregular. They are not nullities. And it is quite wrong to describe them as such.

Any proceeding commenced, or any order or judgment obtained, in breach of a rule of Court is always subject to the curative power of the Court available under O. 2 r. 1 of the Rules of the High Court 1980. Whether a particular proceeding should be cured is, of course, a matter of discretion for the Court whose assistance is prayed in aid to effect the cure. It is wrong to assume that the Court is obliged in every case to overlook the breach of a rule of Court. For that would mean that a litigant may honour the Rules of the High Court more by breach rather than by observance. This is certainly not the law.

The proper approach is for a Court to accept that a breach of a rule of Court renders the particular proceeding irregular with a power in the Court to excuse the non-compliance. That power, as in all matters calling for curial discretion, is to be exercised judicially having regard to the substantial merits of a case and having particular regard to the interests of justice. Thus, for example, to say that a judgment entered for too much is automatically bad or is automatically curable is to take an extreme position that is unsustainable in law. Such a judgment **may** be set aside if to cure it by amendment would do greater injustice to the particular defendant. On the other hand, such a judgment may be cured by amendment if not to do thus would result in greater injustice to the plaintiff. Ultimately, it is the objective perception of a Court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the Court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceeding.

In my judgment, the correct position is that stated by Cumming-Bruce LJ in *Metroinvest Ansalt v. Commercial Union Assurance Co. Ltd.* [1985] 2 All ER 318, 323:

> As I construe O. 2 r. 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document remains irregular *inter partes* until the matter has been brought before the Court and the Court has decided in which way to exercise the jurisdiction conferred by O. 2 r. 1(2). Order 2 r. 2 does not restrict the power of the Court in the sense of restricting its jurisdiction, and does not have the effect of suspending the irregularity until the application under O. 2 r. 2 is made. The purpose and effect of O. 2 r. 2 is to prescribe the procedure if and when an opposite party decides to apply so that the Court on recognising the irregularity, may exercise its powers under r. 1(2) by taking the action of killing or curing the irregular proceeding.

For these reasons, it was therefore not open to the defendants in the present case to treat themselves as not being bound by the default judgment of 2 December 1991.

I have made these observations in relation to the conduct of the proceedings in the Court below because a reading of the record provided has left me with the inescapable conclusion that steps appear to have been taken in complete breach of the express provisions of the Rules of the High Court 1980, with not so much as a word of protest from anyone. Indeed, for the purposes of this case, solicitors having the carriage of the proceedings on both sides appear to have produced their own version of the rules of Court and ignored the authoritative provisions.

Counsel and solicitors should need no reminder that rules of Court exist to be complied with by obedience and not by breach. Whilst a particular departure from a rule of Court may have to be examined on its own merits, there ought not to be, as was in this case, a wholesale disregard of them.

Returning to the mainstream, on 31 January 1992, the defendants took out a summons by which they sought to set aside only so much of the order as directed an assessment of damages. This was followed by a second summons dated 1 April 1992, by which they applied to have the writ struck out on the ground that the indorsement upon it did not disclose any cause of action. Both summonses came up for hearing before the learned Judge in chambers on 23 July 1992. After hearing arguments, he dismissed both applications, but granted an application for further argument upon them in Court. When the summonses came on for further argument in Court on 12 August 1992, Counsel asked to put in written submissions and the learned Judge acceded to this request.

The learned Judge delivered his decision on 28 October 1993. He reversed the order he had earlier made in chambers and set aside the whole of the judgment in default dated 2 December 1991. He also struck out the writ. Consequently, the injunctions obtained by the plaintiffs on 9 November 1991, and confirmed by the learned Judicial Commissioner on 28 November 1991, fell to the ground.

The first question I propose to deal with is whether the learned Judge was right in setting aside the judgment in default of appearance in toto.

Encik Das who appeared for the plaintiffs before this Court, but not in the Court below, advanced two main reasons in support of his argument that the learned Judge was wrong in setting aside the judgment in default. I will outline these in turn.

First, all that the learned Judge had before him was a summons to set aside only the order directing the assessment of damages. There was never any challenge by the defendants to so much of the judgment which decreed specific relief. He ought therefore to have confined himself to the terms of the application before him and, as he was in agreement with the defendants' arguments, he should have set aside only that portion of the order to assess damages. He went too far in setting aside the default judgment in its entirety. Those then are the first set of arguments.

The second main submission is based upon the doctrine of estoppel. The defendants had by their conduct led the plaintiffs to believe that the action will not be defended. The contents of the telephonic conversation which the defendants' solicitors had with the plaintiffs' solicitor on 27 November 1991, and which was related by the latter to the learned Judicial Commissioner the following day, accompanied by the defendants' failure to enter a form of appearance, constitutes material sufficient to support an estoppel. To this may be added the fact that the plaintiffs, encouraged by the defendants' conduct proceeded to enter judgment in default. Having thus conducted themselves, it was not open for the defendants now to challenge the default judgment. So much then for the second submission of Counsel.

I will now express my views upon each of the foregoing submissions.

Taking the first argument, it is beyond dispute that the plaintiffs, by the indorsement to the writ, principally claimed specific relief. The claim for general damages was a mere adjunct to the main relief. The defendants admittedly did not enter an appearance to the writ. But did that entitle the plaintiffs to enter judgment in default in the form in which they did? The answer to that question must, I think, be derived from the relevant rule of Court that governs a case such as the present. It is common ground that that rule is O. 13 r. 6(1). It reads as follows:

> 6(1) Where a writ is indorsed with a claim of a description not mentioned in rr. 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

The wording of the rule makes it plain that, in the present case, the plaintiffs were clearly not entitled to enter judgment in the form in which they did. Since the conditions precedent prescribed by O. 13 r. 6(1) were absent, the judgment entered against the defendants was irregular and was therefore liable to be set aside. I say "liable", because, as earlier observed, there is power in

the Court to permit a judgment to stand albeit that it was obtained in breach of a rule of Court or of practice.

In the present case, it is necessary to see the purpose of the rule in breach of which judgment was entered. If the requirements of O. 13 r. 6(1) are a mere technicality, as was contended by Encik Das, then the Judge ought to have properly disregarded the breach and permitted the judgment to stand. However, I find that both principle and authority are against Counsel.

As for authority, I need go no further than the decision of the Supreme Court in *Lam Kong Co. Ltd v. Thong Guan & Co. (Pte) Ltd.* [1985] 2 MLJ 429. That was a case which concerned O. 13 r. 12 of the Rules of the Supreme Court 1957, which, in substance, is not dissimilar to O. 13 r. 6(1). The plaintiff in that case had, in its specially indorsed writ, claimed specific performance of a contract for the sale of certain lands and for ancillary relief. The defendant failed to enter an appearance. The plaintiff then entered a judgment form, *inter alia,* for the delivery up of the titles to the lands in question as well as valid and registrable transfers in respect of those titles. An application by the defendant to have the default judgment set aside was dismissed at first instance. The defendant then appealed to the Supreme Court which allowed the appeal.

Abdul Hamid CJ (Malaya), later CJ, Malaysia, when delivering the judgment of the Supreme Court, after setting out the proper steps that ought to be taken in a case to which O. 13 r. 12 said (at p. 431):

> It is to be observed that the effect of the rule was to disentitle the respondents from entering default judgment on a writ specially indorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the Court or Judge to consider giving judgment as upon the claim the Court or Judge should consider the respondents to be entitled. At that point of time therefore judgment in default was not only given in breach of r. 12 but had resulted in a failure to comply with r. 11 of O. 27. In the circumstances we are constrained to hold that the breach and the non-compliance were not merely irregularities but fundamental defects. **The fundamental defect was not, in our view, curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action.** (Emphasis added.)

The proposition that is to be gathered from the decision in *Lam Kong* is this. A judgment in default of appearance entered by a plaintiff, or, for that matter, a counterclaiming defendant, in breach of the terms of O. 13 r. 6(1), may be set aside *ex debito justitae*. And on an application of the proposition to the facts of the instant appeal, there is no doubt whatsoever that the judgment in default obtained in the present case was fundamentally flawed.

Encik Das, however, argued that it is not every judgment in default entered in breach of the provisions of O.13 r. 6(1) that may be said to be fundamentally defective. He said that a Court should uphold such a judgment in cases where to countenance an application to have it set aside would amount to an abuse of the Court's process. In support of this submission, Counsel cited the judgment of Robert Goff J (later Lord Goff of Chievely) in *Stewart Chartering Ltd. v. C & O Managements S.A.* [1980] 1 All ER 718 which was approved and applied by the English Court of Appeal in *Jet West Ltd. & Anor. v. Haddican & Ors.* [1992] 1 WLR 487. I would observe that both cases were concerned with the issue of a Mareva injunction in aid of a judgment. I would also observe that in *Stewart Chartering (supra)*, the English Court granted leave to enter judgment in default despite the terms of O. 13 r. 6(1) in order to prevent an abuse of its process, and after the chief clerk in the judgment room had declined to accept a default judgment form in the ordinary way.

While I agree with Counsel that a Court may grant leave to enter judgment in disregard of the provisions of O. 13 r. 6(1) to prevent a defendant from abusing the Court's process by resorting to that rule, I find no room to apply that principle in the present case. Plainly stated, there was no leave obtained from the Judicial Commissioner to enter judgment for the several heads of specific relief. Further, for reasons that will appear clear in a moment, this is not a case where the defendants were seeking to abuse the Court's process by resorting to the rule presently under consideration. If anything, it was the plaintiffs who abused the Court's process by securing an order to assess damages without the benefit of a judgment in their favour.

The philosophy underlying O.13 r.6(1) is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon the question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the Court, upon a motion for judgment, that the case is a fit one for the grant of specific relief.

Cases may occur where the defendant may have infringed a plaintiff's right: yet the plaintiff may be denied declaratory relief upon settled principles governing the exercise of discretion, e.g., that he has an adequate alternative remedy which he has not resorted to. A defendant who has failed to enter an appearance to an action for specific relief is not precluded from appearing in person or by Counsel at the hearing of the motion for judgment for the purpose of contending that the particular case is one in which discretion should be exercised against the plaintiff and that specific relief ought to be denied him.

When viewed in this fashion, it is not difficult to see why O. 13 r. 6(1) is worded in the way in which it appears. The rule exists to preserve the discretion of the Court in actions for specific relief despite the non-appearance of a defendant. It is not a mere technicality, as suggested by Counsel, but has to do with policy considerations that have evolved through the exercise of jurisdiction by a Court of Equity. To deprive a defendant the right of appearing upon the motion for judgment and arguing that discretion ought not to be exercised in a plaintiff's favour is a serious matter. It constitutes the breach of a substantive right forming part and parcel of the doctrine of procedural fairness. And the entry of a form of judgment in default in a case to which O. 13 r. 6(1) applies has the effect of withholding, from a defendant, without the Court's sanction, the procedural fairness to which he is entitled.

The next question that arises is whether the learned Judge was right in reversing the order he made in chambers and in setting aside the whole of the judgment, when the summons before him sought to set aside only so much of the judgment that directed the assessment of damages. I think that he was.

This is a case in which the plaintiffs had absolutely no right whatsoever to obtain an order for the assessment of damages. There was, as earlier observed, no judgment for damages against the defendants on 28 November 1991. It is elementary law that there can be no assessment of damages in the absence of a judgment granting damages. Such a judgment did not come until 2 December 1991. So, here is a case where the cart had been squarely placed before the horse. The judgment for the assessment of damages was found in a judgment in which was flawed in other respects. The learned Judge was therefore perfectly entitled, in the interests of justice, to take cognisance of the breach of O. 13 r. 6(1) and to set aside the whole of the offending judgment. The authority of a Court to act *suo motu* to set aside a judgment entered pursuant to its coercive power must, no doubt, be exercised with caution. But it is there to be exercised in appropriate cases; and I am satisfied that the case at hand was indeed a proper case.

I now turn to consider the argument mounted upon the doctrine of estoppel. The answer to the complaint made by Counsel lies in appreciating the true nature of the doctrine. As observed by Mohd Azmi FCJ during argument, the doctrine is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. It is therefore extremely flexible in its application because it moulds itself to fit a particular fact pattern. Accordingly, the categories of cases to which the doctrine applies are not closed.

In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course. Decisions upon the application of the doctrine to litigation are but mere illustrations of the broader proposition. Indeed this is true of all cases where the doctrine has been applied to other spheres of human activity.

For present purposes, it is sufficient to draw from two such examples.

In *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] 1 MLJ 7, the doctrine was applied to the following circumstances. The plaintiff, after having lodged a caveat, brought an action for specific performance of a contract for the sale of land. At first instance, he failed to obtain specific relief. He was, however, awarded damages for breach of contract. The defendant appealed to the Court of Appeal of Singapore for a reduction in the size of the award. It was open to the plaintiff to cross appeal, but he chose not do so. Instead, he elected to pursue with execution of the award of damages. The defendant was able to obtain the plaintiff's agreement to withhold execution only upon securing the judgment sum in the hands of a banker upon fixed deposit. At the hearing of the appeal, the plaintiff requested for and obtained leave to cross appeal against the refusal of specific performance.

The Court of Appeal, unaware of the arrangement that had been arrived at between the parties on the question of a stay, granted the leave sought, dismissed the defendant's appeal and allowed the plaintiff's cross appeal. Upon the defendant's further appeal to the Privy Council, the Board, allowed the appeal and restored the order of the trial Judge. The Board held that the plaintiff, by his conduct in calling for the damages awarded to him, had demonstrated that it was not pursuing its claim for specific performance. He was accordingly estopped from doing so before the Court of Appeal.

The majority judgment of the Judicial Committee was delivered by Lord Templeman who said (at p. 11 of the report):

> In Spencer, Bower and Turner *"The Law relating to Estoppel by Representation"* 3rd Edn. (1977), para. 310 summarises the doctrine of election as applied to the law of estoppel in these terms:
>
> > Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt

> the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

In the present case the purchaser could not take the damages and obtain specific performance. By demanding and accepting the deposit of the damages the purchaser chose to adopt the order of the trial Judge and relinquished the right to appeal for that order to be set aside and for specific performance to be substituted. The vendor altered its position to its detriment by raising and paying $297,500 on 12 November 1981. The vendor has been deprived of that sum ever since. After the judgment of A.P. Rajah J the purchaser was indeed confronted with two alternative and mutually exclusive courses of action, namely, to enforce the award of damages or to seek to persuade the Court of Appeal to set aside the award of damages and to substitute the remedy of specific performance.

By procuring the payment of the damages of $297,500 the purchaser accepted the Judge's order. If the purchaser had served a notice of appeal seeking specific performance or had informed the vendor that the purchaser intended to seek an order for specific performance from the Court of Appeal, the vendor would have been able to refuse to place the damages on deposit and would have been entitled to renew and to succeed in an application for a stay of execution with regard to the damages pending the hearing of the purchaser's appeal seeking specific performance.

Paragraph 322 of the cited work by Spencer, Bower and Turner relating to election in the conduct of litigation is in these terms:

> Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favour, was wrongly decided as to the residue.

Mr. Nugee submitted that this statement is not justified by authority but it appears to be good law and good sense. Here the purchaser, by obtaining the deposit of the damages of $297,500, took the benefit of the decision in its favour made by A.P. Rajah J and thereby precluded the purchaser from arguing that his decision was erroneous.

The second authority is *Langdale & Anor. v. Danby* [1982] 1 WLR 1123, which concerned an application for summary judgment decreeing specific performance. At the hearing of the summons before the Judge at first instance, the defendant expressly admitted that the no impropriety was alleged against

the first plaintiff, who was a solicitor. The Judge entered summary judgment. On appeal, the English Court of Appeal admitted further evidence which in effect amounted to a withdrawal of the admission made before the Judge. The Court of Appeal, having expressed its satisfaction that there was no material before the Judge to merit a trial, held that there were triable issues upon the fresh evidence admitted before them. Leave to defend was accordingly given. The plaintiffs appealed to the House of Lords which allowed the appeal and restored the decree of specific performance granted by the Judge.

In a speech in which the other members of the House concurred, Lord Bridge of Harwich said (at p. 1135 of the report):

> My Lords, with all respect, I cannot agree with any of the reasons suggested for holding that the conduct of Mr. Danby's case before Oliver J and in particular the admission that no impropriety was attributed to Mr. Langdale did not estop Mr. Danby from alleging, nearly two years later, that the judgment of Oliver J could be reversed on grounds which were not taken before Oliver J and which directly accused Mr. Langdale of improper conduct as a solicitor. In this context, I confess I simply do not understand the distinctions sought to be drawn by Dunn LJ between the conduct of the case before Oliver J and Mr. Danby's subsequent delaying tactics or between the grant of leave to appeal out of time and the decision of the appeal itself, or that drawn by Fox LJ between matter going to costs and matter going to substance.
>
> As I see it the direct result of the conduct of Mr. Danby's case before Oliver J was to permit the Langdales to obtain summary judgment. They then spent nearly two years in time and a great deal of money in costs in the course of enforcing that judgment. True it is that part, but part only, of the costs so incurred could be and were set off against the balance of the purchase price of the cottage due to Mr. Danby, probably Mr. Danby's only significant resource. But now, if the Court of Appeal judgment were to stand, the Langdales would face a full scale trial against a legally aided defendant in which, though they succeeded, they would have little prospect of recovering any of their costs. Looking at this history in a common sense way, it seems to me beyond argument that the Langdales will have acted to their detriment, on the faith of the conduct of Mr. Danby's case which enabled them to obtain summary judgment, by spending large sums to enforce that judgment, if they are now denied the benefit of it by allowing Mr. Danby to set up a case which conflicts radically with the case presented on his behalf before Oliver J. Independently of any other ground I would, therefore, hold Mr. Danby estopped from arguing the case on which he succeeded in the Court of Appeal.

With one qualification that I shall state in a moment, the passages above-quoted – from the opinion of Lord Templeman in *Meng Leong*, and the speech of Lord Bridge in *Langdale* – reflect the consequences that flow upon an application of the doctrine of estoppel to the conduct of litigation. The

qualification I make is this. The approach to the doctrine of estoppel, in particular to the requirement of there having to be "a detriment", has, by the flow of authority that has come after the decisions in *Langdale* and *Meng Leong*, including the decision of this Court in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331, been re-stated in broader terms to accurately reflect the true nature of the doctrine.

Accordingly, the global question which a Court must ask itself is this: is it just and equitable that the particular litigant (against whom the estoppel is raised) should succeed, given the totality of the facts and circumstances of the case? If the answer to that question is in the affirmative, estoppel does not bite: if the answer is in the negative, then it does.

In the present case it was argued that it is not open to the defendants; they having encouraged the plaintiffs to believe that the action will not be contested; to challenge any judgment entered in the proceedings, however irregular that judgment may be. But this submission overlooks two matters of vital importance.

First, as was observed by the Chief Judge of Malaya during argument, it does not appear sufficiently clear whether the defendants were content in not opposing the particular summons for the interlocutory injunction or whether they were throwing up their hands in abject submission to the whole action. In the absence of that level of clarity which the law demands in cases of estoppel, it is difficult to see how the doctrine could operate against the defendants in the present case.

Second, the plaintiffs, in order to be able to argue that it would be inequitable to permit the defendants to retreat from the position earlier adopted, must demonstrate that they themselves have acted equitably. For, he who comes to equity must come with clean hands; and the plaintiffs' conduct, when objectively viewed, does not meet the test housed in this maxim of equity.

At most, the plaintiffs were, when they appeared before the Judicial Commissioner on 28 November 1991, entitled to a confirmation of the injunction. However, they went on to obtain an order directing the Senior Assistant Registrar to assess damages. If it offended their conscience, as it ought to have done, it was open for them to approach the Court and to have the offending part of the order expunged. But they did not do so. Indeed, they went so far as to resist the defendants' application to set aside the order directing assessment, thereby evincing an intention to assert the correctness of their actings.

The plaintiffs were, therefore, guilty of unconscionable conduct and this had the effect of releasing the defendants from any estoppel that may have held them in its grip. Once thus released, the parties were placed on an equal footing *vis-a-vis* the litigation. Thereafter, it was open to the defendants to pursue any and all courses made available to them by adjectival law to rid themselves of the offending judgment.

In my opinion the learned Judge was, for the reasons given, quite correct in setting aside the whole of the judgment in default obtained by the plaintiffs on 2 December 1991. Since the arguments raised in support of the first appeal did not merit a response from Counsel for the defendants, he was not invited to make any.

With that I now turn to the second appeal directed against the order of the learned Judge striking out the plaintiffs' writ on the ground that it failed to disclose a cause of action. The primary argument advanced by the defendants in support of their application; an argument which found favour with the learned Judge; was the plaintiffs' failure to deliver a statement of claim after service of the writ.

The rule of Court relied upon by the defendants in support of this argument is O. 18 r. 1 of the Rules of the High Court 1980, which reads as follows:

> 1. Unless the Court gives leave to the contrary or a statement of claim is indorsed on the writ, the plaintiff must serve a statement of claim on the defendant or, if there are two or more defendants, on each defendant, and must do so either when the writ, or notice of the writ, is served on that defendant or at any time after service of the writ or notice but before the expiration of 14 days after that defendant enters an appearance.

On a proper construction of this rule, a plaintiff, may serve his statement of claim with his writ and certainly not later than 14 days after a defendant has entered an appearance.

In the present case, neither defendant entered an appearance until after judgment had been signed. The rule upon which the defendants' primary argument is based has therefore no application to the facts that exist here. That should indeed be the short answer to submissions of Counsel for the defendants. However, he went on to argue that the indorsement was rightly struck out under O. 18 r. 19 because it did not disclose any reasonable cause of action.

The point taken by Encik Lim Kem Thuan for the defendants is sufficiently met by the decision in *Lim Hean Pin v. Thean Seng Co. Sdn. Bhd.* [1992] 2 MLJ 10. It is an authority that I prefer to those cited by Counsel. There, Edgar

Joseph Jr J (now FCJ) was faced with an indorsement in a writ which read as follows:

> The plaintiff brings this action for himself and for and on behalf of all the other shareholders of the first defendant other than the defendants herein who are also shareholders of the first defendant in this action, the plaintiff claims for:
>
> (i) a declaration that the act of refusal by the second to seventh defendants in objecting (to) the proxy [form] lodged by the plaintiff at the first defendant's 42nd annual general meeting is (was) wrongful in law and is (was) an abuse of their powers as directors;
>
> (ii) a declaration that the annual general meeting of the first defendant held on 21 January 1991 is (was) null and void and all resolutions passed thereto (should) be set aside accordingly;
>
> (iii) an injunction against the first to seventh defendants from implementing and/or exercising their powers to effect the resolutions passed at the 42nd annual general meeting of the first defendant held on 21 January 1991 or any adjournment thereof;
>
> (iv) a declaration that the extraordinary general meeting scheduled for 31 January 1991 and the resolution intended to be passed thereat to amend art. 56 of the articles of association of the first defendant is (was) an abuse of the powers of the fourth and fifth defendants as directors of the first defendant company and is (was) not for the benefit of the first defendant company and is (was) a fraud on the minority shareholders of the first defendant company;
>
> (v) an injunction against the first to seventh defendants whether by themselves, their servants or agents from proceeding with or holding the extraordinary general meeting of the first defendant scheduled on 31 January 1991 and from in any manner altering or amending the articles of association of the first defendant company;
>
> (vi) damages for breach of duties;
>
> (vii) interest on damages;
>
> (viii) costs; and
>
> (ix) such further or other reliefs.

Addressing an argument that the foregoing indorsement did not disclose a cause of action and ought therefore to be struck out, his Lordship said:

In my view, paras. (i) and (iv) of the endorsement in the amended writ of summons did disclose a cause of action. In any event, the lengthy affidavit of the plaintiff affirmed on 28 January 1991 (encl. 5) filed in support of the amended *ex parte* summons-in-chambers (encl. 4) pursuant to which I had granted the injunctions had identified a legal right sufficient to give rise to a justiciable cause of action (see *Utusan Melayu (Malaysia) Bhd. & Anor. v. Chan Tse Yuen* [1989] 1 MLJ 185). This ground therefore failed.

In the present case, the declarations contain a statement of facts that adequately identify a cause of action. As executors of the deceased, the plaintiffs were entitled – indeed were duty bound – to protect the assets of his estate. That they were executors and that their management of the Tampin Sawmill had been interfered with and that there may be continued interference appears quite sufficiently from the declarations and injunctive relief sought in the indorsement and from the affidavit filed in support of the summons for the *ex parte* injunctions.

There is no dearth of authority dealing with the approach that a Court should take when exercising its summary jurisdiction under O. 18 r. 19. The unanimous view is that the summary power ought not to be invoked save in a plain and obvious case. See *Bandar Builder Sdn. Bhd. v. United Malayan Banking Bhd.* [1993] 3 MLJ 36, per Mohamed Dzaiddin SCJ (as he then was).

An examination of the record provided demonstrates that this is not such a case. There are several issues of law that require mature consideration. And there are several issues of fact that are capable of resolution only after taking *viva voce* evidence.

Having given this matter careful consideration, I am convinced that the learned Judge was quite wrong in striking out the writ in this case. There was simply no justification for doing so.

Accordingly the second appeal was allowed, the Judge's order was set aside and the writ restored to file. It was also ordered that the injunctions which had fallen in consequence be reinstated. The plaintiffs were awarded the costs of the appeal, and the deposit paid into Court by them was ordered to be refunded to them. The plaintiffs were also granted leave to serve their statement of claim within two weeks from the date of the order made herein.

As for the first appeal, this was dismissed with costs. All orders made by the Judge were affirmed. The defendants were awarded the costs of the appeal. The deposit paid into Court by the plaintiffs was ordered to be paid out to the defendants to account of their taxed costs.

Prof Ahmad Ibrahim